This *dictum* was cited with approval by Lord Guest in the House of Lords in the case of *John G. Stein Co. Ltd.* v. *O'Hanlon*[8] and by Geoffrey Lane J. (as he then was) in *Waghorn* v. *George Wimpey Co. Ltd.*[9]

It seems to me that the test used by Lord Justice Clerk Thomson is an elaboration of the Second limb of Order 18 Rule 15(2) of the Rules of the High Court 1980 which reads:

". . . . . a plaintiff may in his statement of claim alter, modify or extend any claim made by him in the endorsement of the writ without amending the indorsement."

Learned counsel for the respondent had made no attempt to bring his case within this rule.

I am clearly of the opinion that action framed on nuisance ought to be distinctly and expressly pleaded in the statement of claim in order to give to the defendant a fair notice to meet it. *A fortiori*, the pleadings ought to specify whether or not negligence is to be relied upon to establish it. In my opinion, if the respondent's case were put in the alternative in this manner, the proceedings would no doubt have been developed on wholly different lines. The ambit of discovery would have been enlarged and it is idle to speculate what would have happened if such a case had been made out.

Be that as it may, having regard to the issue raised in the pleadings and the state of the case law on actionable nuisance, in my opinion, it was not open to the learned judge to give judgment in favour of the respondent based on legal nuisance – a cause of action which was neither pleaded, expressly or by necessary implication. Nor was it referred to in the written submissions by both learned counsel.

In such circumstances, the proper order would be to allow the appeal, set aside the judgment of the learned judge and order a new trial before another judge to be founded on nuisance only after the necessary amendments to the statement of claim and defence have been made [see *Kiaw Aik Hang Co. Ltd.* v. *Tan Tien Choy*[10] and *The Chartered Bank* v. *Yong Chan*[2]]. In the exercise of my discretion, I award costs to the appellant in this appeal only to be taxed and that there is no order as to costs in the court below. The deposit to be refunded to the appellant.

**Wan Hamzah S.C.J.** : I have had the opportunity of reading the judgments in draft of my learned brothers Tan Sri Dato Wan Suleiman and Dato George K.S. Seah. With due respect I agree with Tan Sri Dato Wan Suleiman that the appeal should be dismissed with costs. In my opinion averment of nuisance can be perceived from the allegations of the facts contained in the Statement of Claim although the word "nuisance" is not stated.

*Appeal dismissed.*

Solicitors: *Shearn Delamore & Co.; Lee Boon Peng & Co.*

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## LAU CHUN TSAO & ORS. v. SOO CHAI

**[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) April 30 & October 18, 1986]**

**[Kota Kinabalu – Supreme Court Civil Appeal No. 416 of 1985]**

*Land law – Specific performance – Whether transfer executed by contracting party in favour of third person can be cancelled – R.H.C. 1980, O. 81 – Specific Relief Act, 1950, ss. 26(b) & 36.*

In this case the first appellant a housing developer had entered into an agreement to sell a building lot to one Chan Kon Foh. Subsequently the first appellant sold all his interests in the housing estate to the 2nd appellant. Later a substituted agreement was entered into between Chan Kon Foh, the respondent and the 1st appellant whereby Chan Kon Foh assigned all his rights and interests in the building lot to the respondent.

However, the 2nd appellant transferred the building lot to his wife, the 3rd appellant, and she charged the land to the Sabah Bank Bhd. The respondent applied for an order that the transfer of the land by the 2nd appellant to the 3rd appellant was void and should be cancelled under section 36 of the Specific Relief Act, 1950. The learned trial judge gave summary judgement in favour of the respondent and the appellants appealed.

**Held**: (1) section 36 of the Specific Relief Act, 1950, does not empower the learned judge to order the cancellation of the transfer executed by the second appellant to the 3rd appellant;

(2) the Court appears to have the jurisdiction and power to make such an order under section 26(b) of the Specific Relief Act, 1950, but it should only do so after a trial and subject to the conditions contained therein;

(3) the order of the learned Judge should be set aside and leave be given to the appellants to defend the action.

*Case referred to:*

(1) *Ong Chat Pang & Anor.* v. *Valliappa Chettiar* [1971] 1 M.L.J. 224.

SUPREME COURT.

*Cecil Ian Robertson* for the appellants.
*Joseph Lee* for the respondent.

*Cur. Adv. Vult.*

**Seah S.C.J.** (delivering the Judgment of the Court): This is an appeal against an Order made under Order 81 of the Rules of the High Court 1980, whereby the learned judge:

(a) Declared that the transfer of the land CL 015375461 by the 2nd defendant, Wong Kwok, to the 3rd defendant, Chen Si Mui alias Latifah Chen, is void and it is ordered that it be cancelled pursuant to section 36 of the Specific Relief Act 1950;

(b) Ordered that the Agreements mentioned in the Statement of Claim be specifically performed by all the defendants and be carried into execution as follows:

(i) that the defendants do within fourteen days from the date of this Order execute in favour of and deliver to the plaintiff a proper and registrable transfer of the said land, namely CL 015375461 free from encumbrances together with the Certificate required under Rule 25 of the Sabah Land Rules 1930 failing which the Deputy Registrar of this Honourable Court be and is hereby empowered to execute the transfer of the said land to the plaintiff;

(ii) that all the defendants do deliver up vacant possession of the said land to the plaintiff within fourteen days from the date of this Order;

(iii) that all the defendants do redeem the Charge registered as Memorial No. 101813 62 (06) in favour of Sabah Bank Berhad and all other encumbrances against the said land within fourteen days from the date of this Order and

(iv) that all the defendants do pay the plaintiff damages for breach of contract to be assessed and costs to be taxed.

In the view which we take of this appeal we need only to set out briefly the main facts in chronological order.

(a) The 1st appellant (1st defendant in the court below) was the original developer of Far East Garden Housing Estate, Kota Kinabalu, Sabah. On July 22, 1974 he entered into a Sale and Purchase Agreement in writing with one Chang Kon Fah for the purchase of one building Lot 52 together with a 2-storey semi-detached house to be erected thereon on land held under CL 015375461. The agreed purchase price was to be $72,000/- of which a total of $24,000/- had been paid and received.

(b) On March 2, 1976 the 1st appellant sold and transferred all his interests in Far East Garden Housing Estate on land held under CL 015375461 to the 2nd appellant (2nd defendant in the court below). Under the terms of the agreement the 2nd appellant acquired all the liabilities and benefits of all the Sale and Purchase Agreements entered into between the 1st appellant and the other purchasers including Chang Kon Fah.

(c) On May 18, 1977 a Substituted Agreement was entered into between Chang Kon Fah, the respondent (plaintiff in the court below) and the 1st appellant whereby Chang Kon Fah assigned all his rights and interests in Lot 52 to the respondent for a consideration stated to be in the sum of $24,000/- and under clause 5 the respondent "hereby binds himself legally liable and obligated to the terms and conditions under the name of the First Party (Chang Kon Fah) in the said original agreement". This Substituted Agreement was signed by the 2nd appellant as attorney for the 1st appellant.

(d) The 2nd appellant transferred Lot 52 and the building thereon to his wife, the 3rd appellant (3rd defendant in the court below) for love and affection. It was dated April 17, 1980 but it was only registered at the Sabah Central Land Registry on January 24, 1981 *vide* Memorial No. 10178043.

(e) On June 14, 1981 the 3rd appellant charged Lot 52 and the building thereon to Sabah Bank Bhd. to secure an overdraft of $500,000/- in favour of Wong Kwok Contractors Sdn. Bhd., Kota Kinabalu, Sabah. This Charge was duly registered on June 29, 1981 *vide* Memorial No. 10181362.

The main point taken by learned counsel for the appellants was that the learned judge erred in law in ordering the cancellation of the transfer of the land held under CL 015375461 by the 2nd appellant, Wong Kwok, to the 3rd appellant, Chen Si Mui alias Latifah Chen. It was submitted that the learned judge had misconstrued the provision of section 36 of the Specific Relief Act 1950 (hereinafter referred to as the Act) which is in the following terms:

"A plaintiff instituting a suit for specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly."

This section speaks implicitly that "if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled"; it makes no reference at all to any transfer executed by a contracting party in favour of a third person. We agree with the submission of learned counsel for the appellants that this section does not empower the learned judge to order the cancellation of the transfer executed by the 2nd appellant to the 3rd appellant. We are doubtful whether the learned judge has jurisdiction to make such a summary order under Order 81 of the Rules of the High Court 1980 and without hearing full argument on the matter, we prefer to keep this point open for future decision. On the other hand, the court appears to have the jurisdiction and power to make such an order under section 26(b) of the Act but in our opinion, it should only do so after a trial and subject to the conditions contained therein [see *Ong Chat Pang & Anor.* v. *Valliappa Chettiar*[1]]. It seems to us that since the exercise of the equitable remedy of specific performance is conditional on the learned judge making an order under section 26(b) of the Act and in view of the unsatisfactory manner the facts were presented in the court below where the long delay and non-execution of the Memoranda of Transfer and Charge had not been explained, we think the proper order to make is to set aside the whole of the Order of the learned judge and give leave to the appellants to defend the action. The appeal is allowed with costs here and below to be taxed. The deposit to be refunded to the appellants. We further direct that the hearing of this action should be expedited.

*Appeal allowed.*

Solicitors: *Skinner Lind Robertson Pang & Willie; Joseph Lee & Co.*

## WOON KIM POH v. SA'AMAH BT. HJ. KASIM

**[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Wan Hamzah S.C. JJ.) November 18, 1985 & October 26, 1986]**

**[Johor Bahru – Supreme Court Civil Appeal No. 251 of 1984]**

*Land Law – Caveat lodged against land – Transfer registered while caveat was still in force – Order of Court – National Land Code, ss. 322(2), 340 & 417.*

The respondent in this case had entered into an agreement with a development company for a joint venture in a housing project on a piece of land belonging to her. Pursuant to the agreement the respondent transferred the land to the company. It was a term of the agreement that a certain sum was to be paid by a certain date and the company should apply for conversion and subdivision of the land within a set period. The respondent alleged that the company had failed to honour its obligations under the agreement and she invoked the provision in the agreement imposing on the company a contractual duty to transfer back the land to her. She lodged a caveat against the land and this caveat was extended. While the caveat was still in force the company transferred the land to the appellant and the transfer was registered. The Registrar claimed that he was acting under an order of the High Court. The respondent applied for the registration of the transfer to be cancelled or be declared null and void. The question was whether the Registrar was correct in law in registering the transfer whilst the said caveat was still in force. The learned trial judge gave judgment in favour of the respondent and the appellant appealed.

**Held**: (1) the Registrar had misconstrued the order of court in this case. The court order was in effect a direction to the Registrar for the removal of the three caveats (not including the caveat lodged by the respondent) and not a direction to register the transfer;

(2) in the Torrens System where registration is the very basis of the system the prohibition in section 322(2) of the National Land Code, which prohibits registration, endorsement or entry on the register document of title of any instrument of dealing so long as a caveat is in force, must be strictly complied with. The Registrar is statutorily obliged to refuse the registration because to do so would be a violation of an expressed provision of the National Land Code;

(3) the appellant cannot claim the protection of section 340 of the National Land Code by the default of the Registrar to observe the statutory prohibition of section 322(2) of the Code.

*Cases referred to:*

(1) *Templeton* v. *The Leviathan Proprietary Ltd* (1921) 30 C.L.R. 34.
(2) *Eng Mee Yong & Ors.* v. *V. Letchumanan* [1979] 2 M.L.J. 212.
(3) *Sungai Biak Tin Mines Ltd.* v. *Saw Choo Theng & Anor. (No. 2)* [1970] 2 M.L.J. 226.
(4) *Damodaran* v. *Choe Kuan Him* [1979] 2 M.L.J. 267.